Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1457

THE LUNDY PACKING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Thomas G. Greaves, III
James M. Miles
HAYNSWORTH, BALDWIN AND MILES, P.A.
Post Office Box 10005
Greenville, South Carolina 29603

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

Petitioner, The Lundy Packing Company, by and through its counsel, Haynsworth, Baldwin and Miles, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on January 26, 1977, in which enforcement was granted in part and denied in part of the Order of the National Labor Relations Board which was entered on March 19, 1976. The decision of the Administrative Law Judge of the National Labor Relations Board was entered on May 28, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (No. 76-1330) is not yet officially reported. The opinion of the National Labor Relations Board (Board) is reported at 223 NLRB No. 36, 91 LRRM 1586, 1975-76 CCH NLRB ¶ 16,698. The opinions are reprinted in the Appendix commencing on pages 1 and 3, respectively. The opinion of the Administrative Law Judge is also reported at 223 NLRB No. 36 and is reprinted in the Appendix on page 7.

JURISDICTION

The judgment of the court of appeals was entered January 26, 1977. Petitioner's Petition for Rehearing *En Banc* was denied by the Court of Appeals for the Fourth Circuit on March 18, 1977. Petitioner's Motion to Stay Issuance of Mandate Pending Petition for Certiorari was granted for a period of thirty (30) days on March 24, 1977. This court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

On July 7, 1974[1] the employees met and decided that if employee Ules Jackson was fired on July 8, they would walk out on strike. Jackson was discharged on July 8, but his discharge was later declared to be lawful. However, despite the specific language of the strike vote, both the Administrative Law Judge and the Board concluded that the July 8 strike was based upon other unfair labor practices which had occurred several weeks earlier: specifically, a discharge on May 24, a discharge on June 18, and four instances each involving an alleged coercive statement by supervisors. One of these earlier unfair labor practices, drawn from comments made by Burrows T. Lundy, president of the company, during his May 8 speech, was ultimately declared to be *lawful* by the Court of Appeals for the Fourth Circuit. In spite of this fact, the Court of Appeals for the Fourth Circuit affirmed the Judge's and the Board's decisions that the July 8 strike was an unfair labor practice strike. The question presented is:

> 1. Did the Judge, the Board and the Court of Appeals for the Fourth Circuit apply an incorrect standard in deciding that the July 8 strike was caused by Petitioner's unfair labor practices, when it is clear upon the record that the clear motivating force which was the admitted primary and substantial cause of the strike was the *lawful* discharge of employee Ules Jackson?

[1] All dates are in 1974 unless otherwise indicated.

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act:

> Section 8(a)(1) [29 U.S.C. § 158(a)(1)]
>
> "It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;"
>
> Section 8(a)(3) [29 U.S.C. § 158(a)(3)]
>
> "It shall be an unfair labor practice for an employer – (1) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

STATEMENT OF THE CASE

I. Jurisdiction Below

This case was before the Court of Appeals for the Fourth Circuit on a Petition for Review filed by Petitioner in the instant case, seeking review of the Decision and Order of the National Labor Relations Board which issued on March 19, 1976. The Court of Appeals for the Fourth Circuit possessed jurisdiction under Section 10(f) of the National Labor Relations Act, 29 U.S.C. Section 151, *et seq.*, based upon the fact that the Petitioner has offices and transacts business in the city of Clinton, North Carolina, within the jurisdiction of the Court of Appeals for the Fourth Circuit.

II. Background

Petitioner slaughters hogs at its plant in Clinton, North Carolina. The organizing drive by Local 525, Meat & Allied Food Workers Union, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Union) began around April 1.

Thereafter, Petitioner made various efforts to defeat the organizing effort. The Board found that between April 1 and July 8, Petitioner, through its supervisors: (1) made statements to employees Ellen Raynor (on June 6), and Ules Jackson

(on or about June 14 and June 17), respectively, concerning "parties" they were attending which created an impression of surveillance; (2) interrogated Ellen Raynor on June 6; and (3) unlawfully discharged employees Willard Chavis and Roy Gene Wilson on May 24 and June 18, respectively. The Board further found that the company's president, Mr. Lundy, made unlawful statements in his May 8 speech. The Board further found that an unenforced no-distribution rule was unlawfully broad and that the July 8 walkout was an unfair labor practice strike. The court of appeals affirmed the Board's decision except that it held President Lundy's May 8 speech to be lawful.

III. The Strike of July 8

On Sunday, July 7, some twenty-three (23) employees met at a night club in Warsaw, North Carolina. The meeting was presided over by employee organizing committee chairman, Johnny Burgess, who sat at the head table with three other employees and by two union representatives, Elsie Hales and James Lawrence. The decision to strike was made that night by vote, and in that regard, the sole proposition actually voted on in this meeting was stated by union representative Lawrence:

> "Q. What was the proposition voted upon?
> A. The proposition voted upon was if Ules Jackson was fired when he went to work on Monday, then they would know that the Company intentions was (sic) to fire all of the union people until they were all fired out of the plant. And, if he was fired Monday . . . ."

General Counsel's witness Otis Simmons also testified concerning the strike vote proposition:

> "Q. What was the proposition voted on?
> A. He asked all in favor — Johnny Burgess asked all that was in favor; you know; of a walkout if Ules Jackson would be fired that morning; next morning which was July 8, how many was in favor of the walkout."

The vote was taken on this proposition, and the next morning, July 8, Ules Jackson was fired and the walkout began. The discharge of Jackson was *lawful.*

The Board and the court below merely affirmed the Administrative Law Judge's finding that the strike was an unfair labor pracaice strike. The Administrative Law Judge based his conclusions concerning the strike upon the following findings of fact:

> "It was decided that should Jackson be discharged they would strike. Jackson was discharged and a strike was called. The strike thus was triggered by Jackson's discharge which has not been found to be unlawful. *However, while the immediate impetus of the strike was Jackson's discharge, the proximate cause of the strike was the fear that Respondent had means of ascertaining who the union supporters were and would discharge them one at a time.* This fear was generated by the Company's unlawful activities, found above, and by the series of discharges commencing with Chavis' termination on May 24 and including Wilson's discharge on June 18, both of which I find were unlawful." (Emphasis added.)

The Judge's conclusion that the employees feared being "found out" and fired was based in part on the remarks of Petitioner's president, Lundy, in the May 8 speech about employers having learned who signed union cards when employees were compelled to testify in Board proceedings about the cards. Thus, the Judge concluded:

> "The speech was intended to dangle a carrot and a big stick before the audience. On the one hand, reference was made to the favorable conditions of work. On the other, the employees were told that the Company did not want a union, was not going to have a union, and would do everything it could within the confines of the law to keep out a union *and the employees also were warned of the possibility that the names of those who signed union authorization cards would become known to the Company.* When coupled with the reminder that

was distributed with the pay checks two days later, it is not surprising that the *employees remembered in differing ways that Lundy had threatened that their jobs were in jeopardy – because that is exactly what, using artful phrases, Lundy intended to tell them.*" (Emphasis added.)

But, this support for the unfair labor practice strike finding was *removed* by the finding of the court below that the May 8 speech was lawful! Therefore, all that remains of the Board's "proximate cause", discussed above, is the "fear that . . . [the Company] would discharge the [union supporters] one at a time". *But*, the testimony of the Board's witness Lawrence reveals that what created this "fear" among the employees was *not* the discharges of Wilson and Chavis, *but rather the discharge of Ules Jackson (which was later found to be lawful)*. Thus, Lawrence testified pursuant to questions from the Board attorney that the sole proposition voted on when the strike vote was taken on July 7 was:

"Q. What was the proposition voted upon?

A. *The proposition voted upon was if Ules Jackson was fired* when he went to work on Monday, *then they would know that the Company intentions was to fire all of the union people until they were all fired out of the plant*. And, if he was fired Monday . . . ." (Emphasis added.)

That this was the *sole* proposition was also confirmed by the testimony of Board witness Simmons. What made them afraid of being "found out" and fired was the speech and the discharge of Ules Jackson – both of which were lawful. Therefore, what made them walk out were two *lawful acts*.

REASONS FOR GRANTING THE WRIT

1. ***This Case Presents an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court.***

The question which is squarely presented by the facts of this case has not been decided by this Court. However, this

question is of immense importance not only to the parties involved, but also to employers, unions and employees everywhere. When a strike occurs, hundreds of persons are out of work. Strikes occur for numerous reasons, occasionally one of which is to protest the unfair labor practice or practices committed by an employer. Strikers who have been engaged in an unfair labor practice strike are entitled to reinstatement to their former jobs even if the employer has hired permanent replacements. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Strikes also occur for reasons which are *not* related to an employer's unfair labor practices; such strikes are designated as economic strikes. When an economic strike occurs, the employer is free to hire permanent replacements for the strikers and may lawfully refuse a striker's request for reinstatement if he has been permanently replaced at the time the strike is ended. *N.L.R.B. v. Mackay Radio & Telegraph Co., supra*, at 345, 346.

It is immediately evident that the decision whether an economic strike or an unfair labor practice strike exists is extremely critical. If the strike is designated as an unfair labor practice strike, large backpay amounts, such as in the instant case, are often awarded.

Since such large personal and proprietary rights are determined by the ultimate label hung on the strike by the Board, it is imperative that a precise definition of what constitutes an unfair labor practice strike exists. However, the courts of appeal are totally inconsistent in their definitions, with disagreement occurring not only among the circuit courts, but also within cases decided in the *same* circuit! This important area of uncertainty can only be settled by this Court's granting of the Petition for Certiorari in this case, and subsequently giving a precise definition of what constitutes an unfair labor practice strike.

II. *A Survey of the Law in the Circuits Clearly Demonstrates That There is Disagreement on the Definition of an Unfair Labor Practice Strike.*

A. The First Circuit has established at least two standards which it utilizes to define an unfair labor practice strike. In *Simmons, Inc., v. N.L.R.B.*, 315 F.2d 143, 146 (1st Cir. 1963), the court articulated a standard by which a strike would be defined as economic if the employer could demonstrate that the strike would have occurred irrespective of any unfair labor practices.

Several years later, the same court stated that a strike would be an unfair labor practice strike if the employer's unfair labor practice was "at least one cause" of the strike. *N.L.R.B. v. Sea-Land Service, Inc.*, 356 F.2d 955, 966 (1st Cir. 1966), *cert. denied*, 385 U.S. 900 (1966).

Two years later, the same court avoided giving any definition when it stated that the strike was "caused by" the employer's unfair labor practices. *N.L.R.B. v. Call, Burnup & Sims, Inc.*, 393 F.2d 412, 415 (1st Cir. 1968).

B. The Second Circuit has apparently established two standards by which an unfair labor practice strike is defined. In *N.L.R.B. v. Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir. 1938), the court stated that a strike would be economic if it would have occurred irrespective of any employer unfair labor practices.

Twenty-five (25) years later, the same court stated that an unfair labor practice strike would exist if "at least one cause" of the strike was the employer's unfair labor practice. *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 269 (2d Cir. 1963), *cert. denied*, 375 U.S. 834 (1963).

C. The Third Circuit has apparently established two standards by which an unfair labor practice strike is defined. In *N.L.R.B. v. Stackpole Carbon Company*, 105 F.2d 167, 176 (3d Cir. 1939), the court stated that a strike would be economic if it would have occurred irrespective of any employer unfair labor practices.

In 1972, the same court stated that an unfair labor practice strike would exist if the employer's unfair labor practice "had

anything to do with causing it". *N.L.R.B. v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972), *cert. denied*, 409 U.S. 850 (1972).

D. The Fourth Circuit's definition of an unfair labor practice strike is extremely unsettled. In 1965, the court stated that "the underlying cause" of an unfair labor practice strike must be the employer's unfair labor practices. *N.L.R.B. v. Southland Cork Company*, 342 F.2d 702, 707, 708 (4th Cir. 1965).

However, two years later the same court articulated two different tests within the same opinion, stating that "a causal connection" was necessary at one point and that the "*clear motivating force* prompting the strike" was necessary at another. (Emphasis added.) *Filler Products, Inc. v. N.L.R.B.*, 376 F.2d 369, 379 (4th Cir. 1967).

E. Although the language which the Fifth Circuit has used to describe its definition of an unfair labor practice strike has differed, that court has apparently settled on "a contributing cause" standard. In *Winter Garden Citrus Products Cooperative v. N.L.R.B.*, 238 F.2d 128, 129 (5th Cir. 1956), the court stated that the strike was "bottomed in part" upon the employer's unfair labor practices and was therefore an unfair labor practice strike. In *Southwestern Pipe, Inc. v. N.L.R.B.*, 444 F.2d 340, 352 (5th Cir. 1971), the court enunciated a standard of "a contributing cause".

F. The Sixth Circuit has concentrated on two phrases in defining the unfair labor practice strike. Under one standard, the employer must establish that the strike would have occurred irrespective of the employer's unfair labor practices. *Larand Leisurelies, Inc. v. N.L.R.B.*, 523 F.2d 814, 820 (6th Cir. 1975); *Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F.2d 720, 729 (6th Cir. 1964), *cert. denied*, 379 U.S. 888 (1964); *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 236 F.2d 898, 907 (6th Cir. 1956), *rev'd on other grounds* at 356 U.S. 342 (1957).

In two of the same cases, the court articulated the "contributing cause" standard. *Larand Leisurelies, Inc., supra; Wooster Div. of Borg-Warner Corp., supra.*

G. The Seventh Circuit has stated that an unfair labor practice strike will exist if it is "at least partly a result" of the employer's unfair labor practices. *N.L.R.B. v. My Store, Inc.*, 345 F.2d 494, 498 (7th Cir. 1965), *cert. denied*, 382 U.S. 927 (1965).

H. The Eighth Circuit has stated that an unfair labor practice strike will exist if the employer's unfair labor practices were "a factor" in causing the strike. *N.L.R.B. v. Columbia Tribune Publishing Company*, 495 F.2d 1384, 1392 (8th Cir. 1974); *N.L.R.B. v. Imperial Outdoor Advertising*, 470 F. 2d 484, 486 (8th Cir. 1972).

I. The Ninth Circuit has apparently decided that an unfair labor practice strike will exist if "one of the reasons" or "one alternative purpose" of the strike is to protest an employer's unfair labor practice. *N.L.R.B. v. International Union of Operating Engineers*, 293 F.2d 319, 323 (9th Cir. 1961); *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 907 (9th Cir. 1953).

J. The decisions of the Circuit Court of Appeals for the District of Columbia have little or no consistency. In *General Drivers & Helpers Union, Local 662 v. N.L.R.B.*, 302 F.2d 908, 911 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 827 (1962), the court stated that an unfair labor practice strike would exist if the employer's unfair labor practices "had anything to do with" the strike. This standard was reiterated in *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 405 F.2d 1373, 1337 (D.C. Cir. 1968). However, this apparently contradicts the court's statement that the unfair labor practice must be the "principal cause of the strike" which was articulated earlier that year. *United Steelworkers of America, AFL-CIO, Local 5571 v. N.L.R.B.*, 401 F.2d 434, 437 (D.C. Cir 1968), *cert. denied*, 395 U.S. 946 (1968).

To further confuse the matter, the court stated in *Teamsters Local 992 v. N.L.R.B.*, 427 F.2d 582, 587 (D.C. Cir. 1970), that a strike would be economic if it would have occurred regardless of the employer's unfair labor practices. This language was reiterated in *Allied Industrial Workers v. N.L.R.B.*, 476 F.2d 868, 882 (D.C. Cir. 1973). However, *Allied Industrial Workers, supra*, also stated that the unfair

labor practice must be "a significant factor" in causing the strike if that strike is to be defined as an unfair labor practice strike.

These decisions have thus created a great deal of uncertainty and have made it nearly impossible for an employer to properly evaluate its position once replacements have been hired and the strikers offer unconditionally to return to work. One commentator has recently observed, "All that can be said with confidence is that if a strike occurs shortly after the employer has committed a serious unfair labor practice, the strikers will be treated as unfair labor practice strikers." R. GORMAN, *Labor Law: Unionization and Collective Bargaining*, Ch. 17, Sec. 3, at 339 (1976). Thus, only the most obvious cases can be predicted with any certainty. This uncertainty has cost the employer and, for that matter, all parties, both time and money in the instant case. This Court should grant Certiorari in the instant case, not only to finally resolve this dispute, but also to precisely define the unfair labor practice strike so that employers may in the future pattern their conduct accordingly, and be able to properly evaluate their legal position when a strike occurs after an alleged (but not yet proven) unlawful act.

III. *This Important Question Was Wrongly Decided Below.*

The court of appeals did not even discuss or articulate the question that is presented in this case. The Administrative Law Judge stated that the employer must ". . . demonstrate that the strike would have occurred . . . irrespective of its unfair labor practices." (A. 63). Both the Board and the Court of Appeals for the Fourth Circuit affirmed this portion of the Administrative Law Judge's opinion without comment.

Petitioner believes that the decisions below in the instant case were based upon an incorrect standard. The opinions below, by both the Board and the court, should have stated that Petitioner's unfair labor practices were the principal or motivating cause of the strike. The use of any less stringent standard places the employer in the position both of carrying an impossible burden of proof, and of being completely unable

to properly assess its position with regard to strike replacements due to the vagueness of the standard to be applied. Further, in view of the confused state of the law, it is impossible for an employer to know what burden of proof exists. As the law currently stands, it is impossible for any employer to determine whether an economic or unfair labor practice strike exists until a final decision is rendered by this Court.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Dated this 22nd day of April, 1977.

Respectfully submitted,
HAYNSWORTH, BALDWIN AND MILES
By: James M. Miles
By: Thomas G. Greaves, III
Counsel For Petitioner

Post Office Box 10005
Greenville, South Carolina 29603